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IN THE

Supreme Court of the United States

October Term, 1946.

WEST KENTUCKY COAL COMPANY

versus

NATIONAL LABOR RELATIONS BOARD.

On Petition for Writ of Certiorari from the Supreme Court to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR THE WEST KENTUCKY COAL COMPANY.

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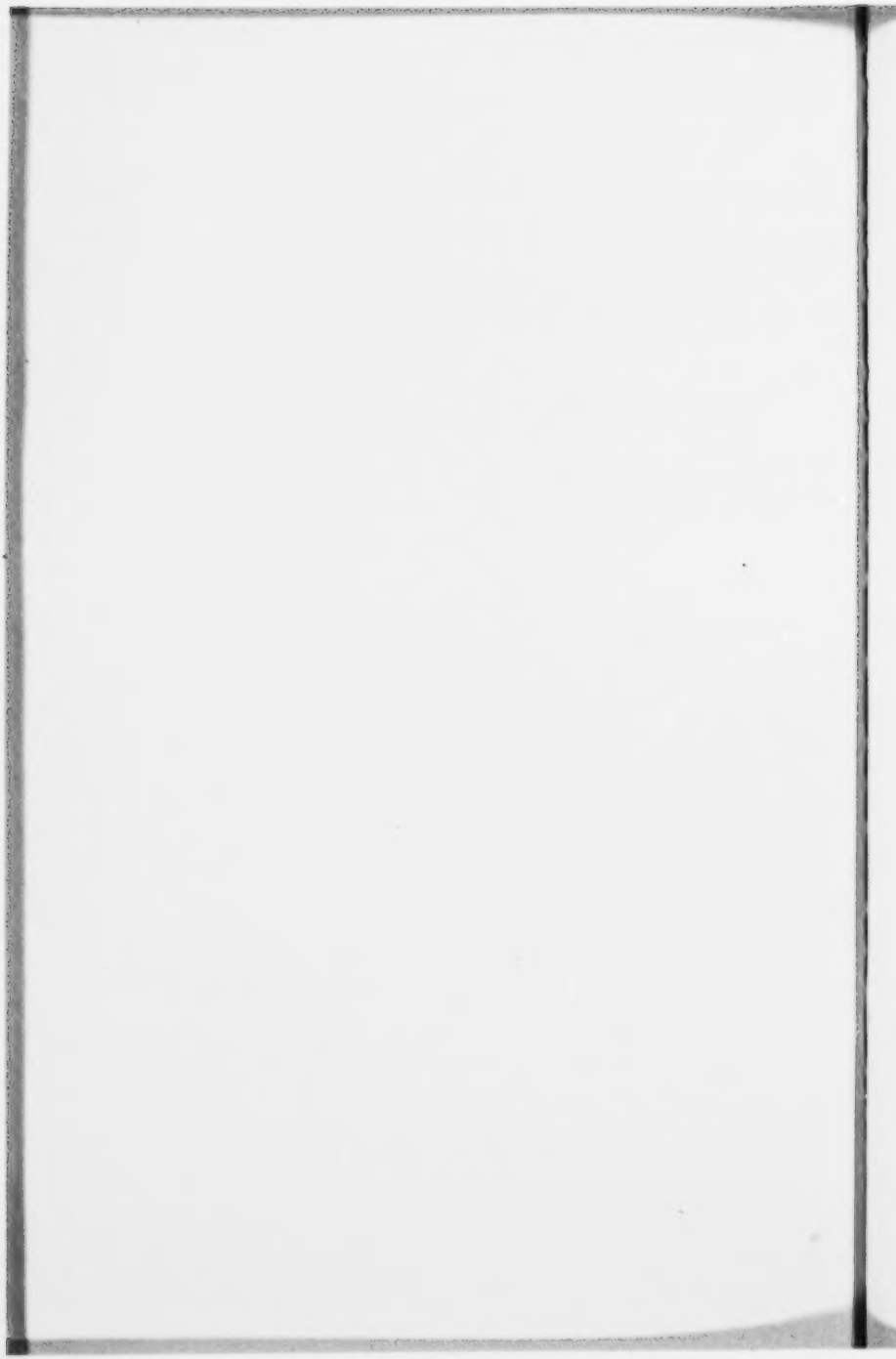

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IN THE

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October Term, 1946.

WEST KENTUCKY COAL COMPANY

v.

NATIONAL LABOR RELATIONS BOARD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

The petitioner makes application for review of the final decree of the United States Circuit Court of Appeals for the Sixth Circuit on a petition for enforcement of an order of the National Labor Relations Board. The lower Court sustained a ruling of the National Labor Relations Board made without the benefit of material evidence which the Board refused to hear, to the effect that all of the production and maintenance employees of the respondent coal company did not constitute an appropriate unit for collective bargaining.

The United Mine Workers of America, hereinafter referred to as the union, contended that each one of four (4) mines of the petitioner were appropriate units, disregarding the fact that the company was conducting an integrated operation with a central executive and administrative staff, frequently closing old mines and opening new mechanized mines, transferring men as such changes were made. The Board divided the operation into two (2) units. As a result of this the petitioner's production and maintenance employees in one unit fixed by the Board, have voted against the union; in another unit at an election in which the petitioner did not participate, the union contends that they have voted for the union; a new mine, since opened, is not included in either unit and one mine included in one alleged unit was closed before an election could be held.

The confusion, producing an impossible operating situation, results in part from the action of the Board in conducting a hearing on November 5, 1943, at Madisonville, Kentucky. At this hearing which was held within a few hours after petitioner had first received official notice that the President of the United States had taken over the operation of its mines, the petitioner refused to participate in the proceedings, contending that it had no authority to do so; that the proceeding was against the United States and that the Secretary of the Interior, who had been designated by the President to operate the coal mines, was a necessary party. After overruling petitioner's motion that the hearing be continued the Board proceeded *ex parte*. It disre-

garded petitioner's contention that its operations must be in one unit for the purpose of collective bargaining and divided petitioner's operations into two (2) units.

In one of these units it held an election. Because it believed that the proceeding on November the 5th was not legally effective for any purpose the petitioner declined to furnish payrolls or checkers or to participate in the so-called election. After the *ex parte* election which the Board conducted it certified that the union had a majority in this unit. In accordance with the plans of the petitioner to modernize, integrate and unify its coal mining operations, the mine constituting the other unit had been closed and no election was held in it.

In April, 1944, a hearing was held on an unfair labor practice charge, resulting from the refusal of the petitioner to bargain with the representative certified by the Board as a result of this election. At that hearing in April, 1944, on the unfair labor practice charge, petitioner attempted to introduce evidence as to what constituted an appropriate unit for collective bargaining among its production and maintenance employees. Such evidence was in part available in November, 1943, when the first hearing was held. It was not offered by petitioner at the first hearing because it was not authorized to proceed and would not proceed in the absence of a necessary and indispensable party, namely, the Secretary of the Interior. When it appeared to the Examiner conducting the unfair labor practice hearing in April, 1944, that the evidence as to what constituted an appropriate unit among petition-

er's employees had been available at the hearing on November 5, 1943, the Examiner held that petitioner was estopped to introduce such evidence because of its failure to introduce it at the former hearing.

In August, 1944, the Board conducted another hearing, as a result of which it designated as an appropriate unit another mine of the petitioner which had not been included in either of the other units formerly designated by it. At this hearing, conducted in August, 1944, the Board refused to open or reconsider its ruling at the first hearing in November, 1943, or its ruling at the unfair labor practice hearing in April, 1944. It designated another unit as requested by the union and conducted an election in the unit which the union lost. In that proceeding in August, 1944, petitioner for the first time was permitted to introduce evidence as to what constituted an appropriate unit.

Proceedings at the hearing conducted in August, 1944, were printed in a separate volume at the insistence of the Board. They appear in Volume II of the transcript. These proceedings should really be considered as one in which the evidence for the petitioner was not introduced until the hearing was held in August, 1944.

In June, 1941, when the company was operating four (4) mines, the company and the union had agreed that the production and maintenance employees in all of these mines constituted an appropriate unit for collective bargaining. An election was held in which all these employees voted. Another election was held November 26, 1941. Between the first and second elections

the company had opened two (2) additional mines and by agreement employees at all of these mines voted. Between the dates of those elections in 1941, which the union lost, and the date when these proceedings began, the company had opened two new mines and closed two (2) older mines. All of these changes were part of a plan to mechanize and integrate the operations. The older hand operations were worked out and discontinued. As a result, production was greatly increased at a time when the Government was insisting upon the importance of such an increase in production. These changes involved extensive transfers of men. The operation of the Selective Service Act made many changes necessary. Between January and July, inclusive, 1944, two hundred and thirty-seven (237) men were transferred, usually from closed mines to new mines.

ARGUMENT.

I.

A. A Hearing on a Petition for Certification of Representatives in Mines Operated by the United States in Time of War, Is a Proceeding in Which the Government Is Interested and in Which It Is a Necessary Party.

"No principle is better established than that the United States may not be sued in the courts of this Country without its consent." *Louisiana* v. *McAdoo, Secretary of the Treasury,* 234 U. S. 627, 58 Law Ed. 1506.

"If the interest of the United States is *substantially* affected the suit cannot be maintained, since the United States cannot be made a party to such a suit without its consent. United States, *Ex. Rel.* Goldbert v. Daniels, 231 U. S. 219, 34 S. Ct. 84, 58 Law Ed. 191. The determinative factor is the effect of the judgment." *Transcontinental and Western Air, Inc.*, v. *Farley*, 71 Fed. 2d 288.

In Executive Order No. 9393, 8 Federal Register, 14877, dated November 1, 1943, the President of the United States by executive order stressed the vital necessity of continuing the production of coal and authorized the Secretary of the Interior to take immediate possession of all mines producing coal in which a strike or stoppage had occurred or was threatened" . . . together with any and all real and personal property, franchises, rights, facilities, funds, and other assets used in connection with the operation of such mines, and to operate or arrange for the operation of such mines in such manner as he deems necessary for the successful prosecution of the war, and to do all things necessary for or incidental to the production, sale and distribution of coal." Elsewhere in the Executive Order, the President committed to the Secretary of the Interior wide power and authority which in effect gave to the Secretary of the Interior full control over all employee relations. Theoretically, at least, the Government became the employer and the Wagner Act was not applicable in a strict sense to the Government. Certainly the "rights" given by the Wagner Act were reduced to privileges to be extended in the discretion

of the President and the Administrator appointed by him.

Petitioner received official notice of this action immediately before the hearing on November 5, 1943. The Secretary of the Interior was then operating its mines through an Operating Manager appointed by him. Our position is that the interest of the United States was directly and substantially affected by this proceeding. It had in its possession all of the property involved. It had assumed the duty of managing and operating the property, and the certification of representatives would directly and immediately affect the operation and management.

The difficulties incident to this problem could not be better illustrated than by reading the Executive Order above referred to. Because of these difficulties the President of the United States had found it necessary, for the effective prosecution of the war, that coal mines be taken over by the Government of the United States, in order to protect the interest of the Nation, and the rights of the workers to continue at work. Employees of this company were continuing at work.

If the union had been their recognized and certified bargaining agent, they would not have been at work.

We can think of no proceeding involving a comparable amount of property or a comparable number of employees which would more immediately, directly or substantially affect the interest of the Government, which was then operating these properties. Because of this interest, and because there was no right or permission to proceed, these cases should have been abated

until the Secretary of the Interior had been made a party or until a reasonable time after these mines had been restored to their owners.

B. An Indispensable Party Was Not Before the Board.

If the interest of the United States is directly and substantially affected, it becomes a real party in interest. Any action taken in this proceeding necessarily affected and involved the operations conducted by the Secretary of the Interior through his operating manager.

> "Even though the United States is not joined as a formal party defendant, if its interest is so directly involved that it is a real party in interest, and any relief that might be given in such a suit will operate against the Sovereign, it is an indispensable party and a suit cannot be maintained. *Morrison* v. *Work,* 266 U. S. 481, 45 S. Ct. 149, 69 Law Ed. 394; *Wells* v. *Roper,* 246 U. S. 335, 38 S. Ct. 317, 62 Law Ed. 755; *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601, 24 S. Ct. 820, 48 Law Ed. 1134; *Belknap* v. *Schild,* 161 U. S. 10, 16 S. Ct. 443, 40 Law Ed. 599." *Transcontinental & Western Air* v. *Farley,* 71 Fed. 2d 288.

It is a well-established rule of law that if an indispensable party is not joined, the suit must be dismissed. *Gnerich* v. *Rutter,* 265 U. S. 388, 44 S. Ct. 532, 68 Law Ed. 1068; *Webster* v. *Fall,* 266 U. S. 507, 45 S. Ct. 148, 69 Law Ed. 411.

In the last case cited an adult member of the Osage tribe of Indians brought suit against the Superintendent of the Osage Agency, a special disbursing agent, charged with the duty of paying and disbursing funds due Osage Indians, and the Secretary of the Interior, seeking a mandatory injunction. There was no service on the Secretary of the Interior, and he did not appear. The other defendants were served, and the case went to trial. The Supreme Court stated that the suit was one which required the presence of the Secretary of the Interior and the bill should have been dismissed for want of a necessary party.

The Secretary of the Interior was a necessary party. The mines were in his possession.

In the case of *Wells* v. *Roper,* 62 Law Ed. 755, a suit was filed to enjoin the First Assistant Postmaster General from annulling a contract with the plaintiff to furnish automobiles for the collection and delivery of mail in the city of Washington. The Supreme Court said:

> "That the interests of the government are so directly involved as to make the United States a necessary party, and therefore to be considered as in effect a party, although not named in the bill, is entirely plain."

C. The Rule Is Applicable to the National Labor Relations Board.

Innumerable other cases could be cited, in support of the rule that the Government may not be sued without its consent, and that this consent can only be given by Act of Congress. *Morrison* v. *Work,* 69 Law

Ed. 394; *Ickes* v. *Fox,* 81 Law Ed. 525. If the rule applies to a suit, *a fortiori* it applies to a proceeding before the National Labor Relations Board, itself a creature of the same Government, which is being proceeded against before it.

There is nothing in the National Labor Relations Act which gives the Board authority to deny to the Government the sovereign rights which it enjoys in constitutional courts.

The immunity which is an incident to sovereignty applies in proceedings before the tribunals organized and created in accordance with the Constitution and Acts of Congress, passed under its authority.

No power has been granted to the National Labor Relations Board which would enable it to nullify or disregard this established rule which is binding on all courts.

No reason has been suggested to us, and we believe none can be advanced, in support of the proposition that the proceedings of the National Labor Relations Board are exempt from the rule of immunity which is attached to the sovereign power which created it.

D. The War Labor Disputes Act.

In Executive Order No. 9393 the President stated that he acted "by virtue of the authority vested in me by the Constitution and laws of the United States, *particularly the War Labor Disputes Act* (Public Law 89, 78th Congress, as President of the United States and Commander-in-Chief of the Army and Navy . . ."

Since he was acting under authority of the War Labor Disputes Act its provisions are clearly applicable. Section 4 of the Act is as follows:

> "Except as provided in Section 5 hereof, in any case in which possession of any plant, mine or facility has been or shall be hereafter taken, under the authority granted by Section 9 of the Selective Training and Service Act of 1940, as amended, such plant, mine or facility, while so possessed, shall be operated under the terms and conditions of employment which were in effect at the time possession of such plant, mine or facility was so taken."

Section 5 above referred to provides for an application to the National War Labor Board for a change in wages or other terms and conditions of employment. Obviously this is the only exception. *Expressio unius, exclusio alterius.* The Secretary of the Interior subsequently proceeded under Section 5. In no other way or manner could he vary or change "the terms and conditions of employment." The prosecution of any other legal or administrative proceeding looking to such a change was a violation of the War Labor Disputes Act.

In taking over the property, management and operation of West Kentucky Coal Company, the President and the Secretary of the Interior acted under the authority of the War Labor Disputes Act. *There is no provision in that Act* for a suit against the United States. In the absence of such a provision no suit can be maintained.

After the President of the United States took over the control and operation of the railroads during World War No. 1, it was held that a suit against the Presidential Agent was a suit against the United States, and could not be maintained without express permission. *Davis, Agent, etc.*, v. *Dye*, 215 Ky. 216, 284 S. W. 1049.

In order to maintain actions at law or suits in equity against the Director General, it was necessary to write into the Acts of Congress provisions expressly authorizing such proceedings. (See Act of March 21, 1918, 40 Statutes at Large, 456, Dh. 25, Sec. 10; Compiled Statutes, Secs. 3115 and ¾ j. See also 4 A. L. R. 1680.)

We have pointed out above that the President could not, by Executive Order, give such consent. This could be done only by Act of Congress. *Morrison* v. *Work*, 69 Law Ed. 394; *Ickes* v. *Fox*, 81 Law Ed. 525.

Any proceeding against the United States must be clearly within the terms of the statute governing the right to sue. *United States* v. *Michel*, 75 Law Ed. 598. Such statutes will be strictly construed.

E. The Right of Collective Bargaining.

The Court below assumed apparently that petitioner contended that the War Labor Disputes Act suspended the right of collective bargaining and that the position of the petitioner would deny the right of collective bargaining. Petitioner has consistently maintained that this right should be extended to all of its production and maintenance employees in all of its mines and that they should all be permitted to vote

at one election in a unit which comprises them all. A condition precedent to the legal exercise of the right of collective bargaining is the determination by agreement or in some other manner, of what constitutes an appropriate unit for collective bargaining. There has been no fair or legally effective ruling on the unit question. It is the ruling of the Board without the benefit of material evidence which would prevent the exercise of the right of collective bargaining.

F. The Coal Crisis.

The United States was at war. It seized the mines to enable it to prosecute the war and to prevent the union from stopping essential war activity. To say that the United States had no interest in a proceeding to bring other producing mines under the control of the same labor organization which caused this crisis, is unsound. We ask the Court to strip the proceeding of deceptive fictions and accept it for what it was. It was an effort to subject the mines of petitioner to the same work stoppage which had upset the production of coal for war industries so many times before and since that hearing. The mines of petitioner had never been subject to such work stoppages. Its was a good war record of steadily increased production. The United States was interested in that production. The President said in his executive order (Tr., p. 91) that "widespread stoppages have occurred."

> "Whereas widespread stoppages have occurred in the coal industry and strikes are threatened

which will obstruct the effective prosecution of the war by curtailing vitally needed production in the coal mines directly affecting the countless war industries and transportation systems dependent upon such mines; and

"Whereas it has become necessary for the effective prosecution of the war that the coal mines in which stoppages or strikes have occurred, or are threatened, be taken over by the Government of the United States in order to protect the interests of the nation at war and the rights of workers to continue at work."

Pursuant to this executive order the Secretary issued his specific order (Tr., p. 87) to Mr. Love, designating him "Operating Manager for the United States," and taking possession of the West Kentucky Coal Company's mines, directing him to fly the national flag of the United States on the mining premises and to operate the mines in accordance with Regulations theretofore promulgated, posting notice of possession as supplied.

Nothing should have been permitted to interfere with production of an essential commodity which called for such emphatic statements from the Commander-in-Chief. The plan urged upon the Board by the union and approved by the Board, of separating the operations of the company into several units, would interfere with the continued production of a vital war product. "Further the Court takes judicial notice that the war emergency requires everything to be done to maintain a high rate of coal production and nothing to be permitted to interfere therewith." *Rocky Mountain Fuel*

Co., U. S. D. C., Colorado, August 5, 1944, No. 12127, 7 W. H. R. 877.

It is impossible to reconcile these facts with the holding that this was a preliminary and non-adversary proceeding.

II.

The Rejection of Petitioner's Evidence as to an Appropriate Unit.

We have pointed out above that these proceedings involved a sharp issue. The issue was squarely presented in the representation cases. In the Unfair Labor Practice case 14-C-922, the parties understood that the proceedings were a step in the process necessary to procure a consideration by the Court below of the legal questions involved in the first representation cases. In reality this Unfair Labor Practice case was the least "adversary" of the proceedings set out in this record. As indicated above the Government took formal possession of petitioner's mines early in November, giving them official notice on the date of the hearing, November 5th. It relinquished this possession on November 17, 1943. At the hearing in the Unfair Labor Practice case, April 17, 1944, based upon petitioner's refusal to bargain, petitioner desired to place in the record, in proper form, material facts relative to an appropriate unit. These facts should have been of interest to the Board regardless of the manner of their presentation. The union was represented by counsel, the petitioner was represented by counsel. The interest of the ma-

jority of all of the employees of the petitioner should have been represented by some one and we submit that it is the duty of the Board not to act solely in the interest of those who wished to become members of a national union, but to consider the rights and wishes of all of the employees involved. If the Board had been interested in safeguarding the rights of all of the employees, it would have welcomed evidence to aid it in reaching a fair and proper conclusion on a disputed question. The Board, however, refused to permit the petitioner to introduce evidence. It applied the principle of estoppel. It took the position that the petitioner should have to practice the case as the Board wanted it to practice it; that it should have introduced this evidence at the first hearing in the representation cases. At the hearing on November 5, 1943, the Examiner attempted to induce the petitioner to present evidence, stating that it could do so without prejudice to its contention as to the invalidity of its proceeding. The attorneys for the petitioner were of the opinion that the Examiner did not have authority to invite them to represent the Secretary of the Interior or to act in the proceeding in any capacity. For that reason, respondent declined to participate in the hearing. Though the evidence as to the appropriateness of the unit was offered for the first time at the hearing in the Unfair Labor Practice case 14-C-922 the Examiner declined to admit it. In sustaining him the Board said, "In the interest of orderly procedure, it follows that the respondent cannot now be given a second opportunity

to prove what it refused to prove at its earlier opportunity."

In effect this imposes upon the company an estoppel certainly not equitable, but highly technical. If the ruling was sound, we would be required to practice a case exactly as the Examiner and Board suggest; otherwise we would act at our peril. This is more technical than any court rules with which we are familiar, current or obsolete. The ruling was not only legally erroneous, but it disregarded the letter and spirit of the National Labor Relations Act, which give primary consideration to the wishes of a majority of the employees in an appropriate unit.

As stated by the Supreme Court in the case of *Pittsburgh Plate Glass Company* v. *National Labor Relations Board,* 313 U. S. 146, 85 Law Ed. 1251, "the unit proceeding and this complaint on unfair labor practices are really one." The ruling of the Board as to the unit was not subject to direct review under the statute. It was subject to review only after a complaint charging an unfair labor practice, predicated upon the ruling as to the unit.

Under Section 9 (c) of the Act (29 U. S. C. A., Sec. 159-C) the Board is free to hold an election or to utilize other suitable methods for determining the bargaining representative in an appropriate unit. It could have a hearing prior to an election or it could have a hearing after an election. The demands of due process of law do not require a hearing at any particular stage, but they do require a fair hearing at some stage. *Inland Empire District Council Lumber*

and Sawmill Workers Union, Lewiston, Idaho, Petitioners, v. *Harry A. Mills,* 89 Law Ed. 1233, decided June 11, 1945.

There could not be a fair hearing unless the evidence of the petitioner was introduced. Certainly the refusal of the petitioner to introduce this evidence at the hearing November 5th was in good faith.

It appears to us that the rejection was arbitrary and in disregard of the duty of the Board to complete its investigation and obtain all the pertinent facts so that it might reach a fair conclusion as to what constituted an appropriate unit. The Board's argument that the representation cases are investigations and not adversary proceedings is most inconsistent with its position in enforcing an estoppel against the petitioner on account of the manner in which it handled its case at the hearing on November 5th.

In this section of our brief it is not our purpose to intimate *arguendo* that the position taken by petitioner on November 5, 1943, was incorrect. We think it was sound. Certainly it was in good faith, as conceded by counsel, for the Board in argument before the Court below. If it had been doubtful, however, the paramount interest of the Board in discharging its duty to determine what was an appropriate unit, should have impelled it to hear the evidence rather than to exclude it. We respectfully insist that the Court below erred in putting the seal of its approval on a finding made as the result of an *ex parte* hearing without the benefit of available material evidence.

III.

Any Bargaining Unit Comprising Less Than All of the Production and Maintenance Employees of Petitioner Would Be Inappropriate.

The Board attempted to defend its ruling, separating the employees of this company into more than one unit, upon the grounds that there is a geographical separation of its mines in Hopkins County from the mines in the adjoining counties. This is the sole ground on which its ruling could be justified. Petitioner contends that this does not amount to substantial evidence when considered in the light of all the facts, which were finally placed in the record after the Board had made its erroneous ruling. The geographical separation is of no consequence under modern transportation conditions. A further ground relied upon is the statement of a witness in the *ex parte* hearing on November 5th, in response to one of a long series of leading questions, that there had been no transfer of men from the Sturgis mines to the Earlington mines in the past two (2) or three (3) years. The facts as to these transfers are shown in the testimony of witnesses for the petitioner in Case No. 14-R-988. We have pointed out in our Statement that two hundred and thirty-seven (237) men were transferred in the first six (6) months of 1944. One hundred and sixteen (116) were transferred from the Union County mines and from Mine No. 10 (Webster County) to the Hopkins County or Earlington mines. Transfers and changes were continuous. In August, 1943, the company employed one

thousand, one hundred and seventy-four (1,174) men in its mines. In August, 1944, it employed eight hundred and eighty (880) men. The mechanization had progressed, production had increased, but the force of maintenance and production employees had been reduced by two hundred and ninety-four (294). (See testimony of Davis Read, Tr., Vol. II, p. 228.)

The transfers occasioned by the closing of the two (2) mines which were closed while these proceedings were pending had not been completed at the time of the last hearing (Tr., Vol. II, p. 235). Transfers were usually on a permanent basis, but the witnesses were not able to suggest any period as a representative period as to the rate of interchange of men from one mine to another (Tr., Vol. II, p. 236). The shift and interchange of employees from one mine to another had grown progressively each year (Tr., Vol. II, p. 237). The interchange of men between mines had been going on throughout the years of operation. It was not traceable solely to the closing of mines, but it had increased. In some cases men made the entire circle of the company's mines and ended up where they started. (See testimony of Lander Chisholm, Tr., Vol. II, p. 246.) The witnesses were able to state that the interchange did continue. Apparently, practically all transfers were made at the request of the men (Tr., Vol. II, p. 248). A large amount of Union and Webster County employees came to Hopkins County (Tr., Vol. II, p. 250). The reason for the transfers was stated in Company Exhibit No. 2 (Tr., Vol. II, p. 315) as follows:

> "When extending territory, opening new entries, replacing employes lost to Armed Service, introducing new machinery, etc., men are transferred from one mine to another. Illustrations; Loading machine helpers and cutting machine helpers transferred as loading machine operators and cutting machine operators. In changing from three 7 hour shifts to two 8 hour shifts at one mine, resulting available men transferred to mine going on two shift per day basis."

Supplies, equipment and parts purchased for us in the mines were interchangeable among the mines. (See testimony of W. S. Williams, Tr., Vol. II, p. 260.) Though the company had four (4) supply houses, any of the mines could call on any of the supply houses for a repair part or any material needed (Tr., Vol. II, p. 262). A machine shop at Sturgis served all four (4) mines and all of the mines have some work done in the Earlington shop. There is some armature work done at the Earlington shop which is not done at the Sturgis shop. In the case of *Jordan Marsh Company* v. *Labor Relations Commission,* decided September 13, 1944, by the Massachusetts Judicial Supreme Court (15 L. R. R. 188), the Court considered a finding and order of the Massachusetts Labor Relations Commission, designating as appropriate bargaining units for a large retail store, a department of forty (40) employees who sold men's clothing as Unit "A" and a department of twenty-one (21) employees who sold furniture and bedding as Unit "B." These units comprised only part of a large number of employees of the store. Commenting on the evidence, the Court said:

> "At the hearing before the Commission nearly all the evidence tending to show the employment conditions and the relations of the members of the sales force to the company and to each other was introduced through obviously intelligent witnesses whose positions in the company were such that they should be familiar with the subjects of their testimony, and they testified clearly, without equivocation, and in precise detail. Their evidence was not contradicted or challenged in any way, either before the Commission or in the argument before us."

The language of the Massachusetts Court could have been applied without change to the evidence introduced by the petitioner in Case No. 14-R-988. We quote from the syllabus of the Massachusetts case:

> "Selection of bargaining units is to promote industrial peace and, as such, must be adapted to manner in which industry operates; stress must be laid on securing groups of employees who have common interests in more important matters which are likely to become subjects of collective bargaining; reasonable consideration must be given also to desires of employees and practical possibility of securing adequate representation for proposed units without unreasonable delay. By these standards, establishment of units of men's clothing salesmen and furniture salesmen in retail department store in which salespeople are frequently moved from one department to another, all employees are hired and fired by central personnel department, and services of company's health and welfare departments are open to all salespeople

alike is not reasonable since only interests in collective bargaining which are shared in common by members of proposed units and not by other members of sales force are such, if any, as may arise from sales of particular merchandise as distinguished from other merchandise; further bargaining interests peculiar to members of these groups seem trivial in comparison with interests shared in common with all other employees."

The testimony of all of the witnesses for the company in Case No. 14-R-988, shows a progressive integration of the company's production operations. The company maintains one central executive office at Earlington. There are located its president, vice president, sales manager, general superintendent, safety engineer, construction engineer and chief electrician. As indicated above, many employees are moved and transferred from time to time. Certain types of maintenance employees work on all of the mines.

The position of the petitioner is that the ruling of the Board as to the unit is not supported by any substantial evidence; that the evidence which was finally placed in the record in Case No. 14-R-988 shows conclusively that the four (4) mines of the company are an integrated, uniform operation, which could not properly be divided into more than one unit for the purpose of collective bargaining. In an industry in which large units have been deemed appropriate it would require some convincing reason to satisfy a fair tribunal that the operation of this company should be divided into more than one unit.

IV.

Failure to Reopen Case Before the Board.

The first hearing referred to above was held November 5, 1943. On November 17, 1943, petitioner was permitted to resume possession and operation of its mines. The Court below commented on the time during which petitioner was in possession of its properties before the unfair labor practice hearing, April 17, 1944. The Court states: "During that time it failed to apply to reopen the case or to be allowed to present the factual side of its contentions in any manner." We do not understand that we had that privilege. There is nothing in the rules of the Board authorizing such a practice. The Examiner had ordered the hearing closed subject to be reopened by the Board, not by the petitioner. We had no reason to think we could reopen the case. If we had attempted to do so we feel sure the Board would have ruled that we were estopped.

The important thing was to designate an appropriate unit. This should have overshadowed procedural matters. The Examiner admitted he was proceeding under a handicap (Tr., p. 128). He made it possible for the Board, but not for the petitioner, to remedy that. We quote the concluding order of the Examiner:

> "The Examiner chose to proceed with the hearing nevertheless with the thought in mind that despite that handicap a sufficiently complete record could be made. Since there is a possibility that the Board may disagree on this point, and since also

the rules and regulations of the Board require me to refer to the Board rulings on the company's motions to dismiss, I am closing the hearing at this time with a reservation and the right in the Board to reopen the hearing for further evidence in the event the Board deems such action advisable, and with, of course, the right to rule on the motion to dismiss. I would assume the Board would have such rights in any event, but I make such reservations specifically so that there may be no question about the matter. With that statement, therefore, and that reservation, the hearing is closed."

(At 3:30 o'clock p. m., Friday, November 5, 1943, the hearing in the above-entitled matter was closed.)

The Board knew that possession of its mines had been restored to the petitioner. It had the right to reopen the case, and if it had desired to obtain full information, and to have all of the material evidence on the unit question, it would have done so.

We submit that we could not have reopened the case and had no reason to believe that an effort to do so would be given consideration.

CONCLUSION.

It is important that the National Labor Relations Board should not be permitted to act arbitrarily and capriciously in the discharge of its duty to determine what constitutes an appropriate unit for collective bargaining. Many necessary changes in all industries incident to the return of veterans and the readjustment

of production in the face of the problems of reconversion, make the unit question an important one. The position taken by the Board and sustained by the Court below, that the determination of an appropriate unit is a preliminary and non-adversary investigation is entirely irreconcilable and inconsistent with the technical rulings against the position of the petitioner. The effect of these rulings is to preclude the possibility of a fair consideration of what constitutes an appropriate unit.

The Court below held that the evidence which the Board refused to consider was material. It said: "Clearly this evidence is material, for it bears upon the organization and operation of the mines, the exchange of employees among the various mines, and contains other information which bears upon the propriety of union representation of individual mines, of groups of mines, or of all of respondent's mines treated as one unit." If the Board were interested in doing its duty in the premises, it should be eager to receive and consider such evidence, not for the benefit of the petitioner or even of the union, but for the benefit of all of the employees of the petitioner who are the real parties in interest and whose rights are disregarded by failure to consider all available material evidence.

This proceeding grows out of the action of an agency of the United States, namely, the National Labor Relations Board, in a national crisis. The Board chose to ignore the crisis and to proceed as though its operations were completely insulated from national and international questions, legal or economic. The

crisis is recurrent and in different form it will arise again. We submit that the action of such an active agency under the circumstances and facts of this case, is of sufficient importance to demand consideration by this Court.

Respectfully submitted,

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